Awang @ Harun bin Ismail & Ors v Kerajaan Negeri Kedah & Ors

HIGH COURT (ALOR SETAR) — ORIGINATING SUMMONS NO 24–709 OF 2006
ZAMANI A RAHIM JC
4 JANUARY 2010

Civil Procedure — Locus standi — Argument fully ventilated at High Court and Court of Appeal — Locus standi point abandoned at Federal Court — Whether amounted to admission — Whether res judicata or estoppel prevents issue from being raised again

Civil Procedure — Locus standi — Threshold locus standi — Test — Whether plaintiffs adversely affected — Whether plaintiffs mere busy bodies — Whether same test applies in public law action — Whether unlawfulness of public authority's conduct override any objections on lack of locus of applicants

On or about 16 December 1997, the first defendant had assented to the structure plan for the District of Yan from 1995–2020 and the same was gazetted on 1 January 1998. According to the structure plan, the Gunung Jerai Forest Reserve was to preserved as a water catchment forest and any activity which could destroy the natural environment and affect the supply of clean water was not allowed. Subsequently, the first defendant granted the approval for a quarry on a 100 acre site in Gunung Jerai and further declared the quarry site as ceasing to be a forest reserve. The fifth defendant was accordingly given a 30 year lease of the site by the fourth defendant. The sixth defendant was the quarry operator. The third defendant approved an Environmental Impact Assessment for the quarry project. In the quarter of 2006, blasting operations began at the quarry site. The fifth defendant had not applied for planning permission as was required by s 19 of the Town and Country Planning Act 1976 ('TCPA'). The above was confirmed by the Legal, Planning and Monitoring Section of the Town and Country Planning Department, Peninsular Malaysia. Accordingly, a stop work order was issued by the Yan District Council against the fifth defendant on 8 March 2006. However, the said stop work order was never enforced by the Yan District Council. The plaintiffs were all inhabitants of the area covered in the structure plan of the Yan District Council, which were located within the 1–3km of the quarry. They contended that they have been adversely affected by the operations of the quarry. Despite operating in contravention of the TCPA, and without any planning permission, on or about 19 February 2006, blasting operations then began on the quarry site. The operations carried on

despite the stop work order issued by the Yan District Council on 8 March 2006. Despite the plaintiffs' appeals, the authorities allowed the quarry to continue its operations. Accordingly, the plaintiffs filed this originating summons seeking, inter alia, a declaration under O 15 r 16 of the Rules of the High Court 1980 ('RHC') that the approval of the sixth defendant's quarry project was null and void. All the defendants then filed applications under O 18 r 19 of the RHC to strike out the plaintiffs' originating summons. The defendants relied substantially on the following grounds: (a) the plaintiffs invoked the wrong procedure in that they should have applied for judicial review under O 53 and not for a declaration under O 15 r 16; and (b) the plaintiffs have no locus standi to bring this action as they do not have any legal proprietary interest in the lands within the vicinity of the quarry. The High Court after hearing the arguments on the wrong procedure and locus standi, allowed the applications. Against the said decision, the plaintiff's appeal to the Court of Appeal was allowed. The defendants applied for leave to the Federal Court. The questions framed, however, were only centered on striking out and the procedure of O 53 of the RHC. The question of locus standi was not raised. The Federal Court dismissed the application for leave, and for this reason the case was returned to the High Court for a hearing of the originating summons on its merits. The plaintiffs had applied to the court to exercise its discretion under O 33 r 2 of the RHC to determine the issue of illegality raised by the originating summons. The defendants however, insisted that the plaintiffs were not entitled to proceed with the substantive issues in their originating summons until they had proved their locus standi before the court. The plaintiffs submitted that the issue of locus standi had been raised and considered by the Court of Appeal, and the matter was res judicata and/or the defendants were estopped from raising the point at this stage.

Held, allowing the plaintiffs' application:

(1) The plaintiffs and defendants fully ventilated their arguments on locus standi at the High Court and the Court of Appeal. The High Court allowed the striking out application by the defendants on the basis that wrong procedure was used. The Court of Appeal considered the issue of locus standi and found that it involved factual disputes, which resulted in the matter being unsuitable for striking out. The Federal Court did not allow the defendants application for leave, and in any event, locus was not even stated as a ground for leave, or as a question for the determination of the court. The abandonment of the locus point by the defendants amounted to an admission of fact that the plaintiffs do have sufficient locus to bring this action. This admission could not be withdrawn and a contrary position now taken (see paras 20 & 30).

(2) The issue of threshold locus standi having fully ventilated in the defendants' striking out applications and subsequent appeal,

res judicata, or issue estoppel (which is res judicata in its wider sense) would prevent the defendants from once again raising the issue of locus standi (see para 36).

(3) The test of threshold locus standi is that the applicant should be 'adversely affected'. In a public law action brought under O 15 r 16 of the RHC, the same test of threshold locus standi will also apply. Only in the most obvious cases ie, where the applicant has no interest at all, can it be said that an applicant has no threshold locus. Otherwise, the matter should be heard as a whole with the main consideration being the gravity of the transgression of the public body. Where there has been an illegality, such unlawfulness of the public authority's conduct will override any objections on the lack of locus of the applicant (see paras 42, 46 & 50).

(4) The plaintiffs were not mere busy bodies as contended by the defendants. They were also not mere public interest or public spirited individuals. Prima facie, they were persons who have sufficient personal interest in the legality of the impugned action. They came within the class of persons the structure plan seeks to protect: those who have homes, orchards or padi fields within the area, those whose source of water are the rivers running in the area for which the forest represents an important water catchment area. They specifically came within the class of persons to be protected by the Town and Country Planning Act. The plaintiffs had also shown some evidence of water from the river Badong and Singkir as being polluted with suspended solids. The right to a reasonably healthy and pollution free environment and the right to livelihood (specifically in relation to the second, third, fourth and fifth plaintiffs) were fundamental constitutional rights (see paras 60, 61(a) & 72).

(5) The illegality in the present case was clear. Section 22(4) of the TCPA clearly means that no development should be carried out if it contravenes the structure plan. In the present case, over and above s 22(4), the structure plan itself was gazetted and thus has the force of law. The excerpts from the structure plan clearly showed that Gunung Jerai Forest Reserve and Sungai Singkir was to be maintained. How could the defendants justify the approval, existence and operation of a quarry on the very site the structure plan stated it to be protected (see para 74).

(6) Having shown a prima facie case of illegality, the burden in fact shifts to the defendants, at least first to fourth defendants to show that their actions were legal. Section 19 of the TCPA also clearly states that no development can proceed without a planning permission and it has been confirmed, not only that the fifth and sixth defendants failed to apply for one but are now carrying operations in contravention of the

second defendant's stop work order. Based on the aforesaid reasons, the defendant must be estopped by the principles of res judicata from once again raising the issue of locus standi in this matter (see paras 75–77).

[Bahasa Malaysia summary

Sekitar 16 Disember 1997, defendan pertama telah memberi persetujuan terhadap pelan struktur untuk Daerah Yan dari 1995–2020 dan yang sama telah diwartakan pada 1 Januari 1998. Menurut pelan struktur, Hutan Simpanan Gunung Jerai hendaklah dikekalkan sebagai hutan tadahan air dan apa-apa kegiatan yang boleh memusnahkan persekitaran semula jadi dan menjejaskan bekalan air yang bersih adalah tidak dibenarkan. Berikutan itu, defendan pertama telah memberikan kelulusan untuk kuari atas tapak 100 ekar di Gunung Jerai dan selanjutnya mengisytiharkan tapak kuari itu sebagai tidak lagi merupakan hutan simpanan. Defendan kelima dengan itu telah diberikan pajakan 30 tahun ke atas tapak itu oleh defendan keempat. Defendan keenam merupakan orang yang mengendalikan kuari itu. Defendan ketiga meluluskan Penilaian Kesan Alam Sekitar untuk projek kuari. Pada suku tahun 2006, operasi peletupan telah bermula di tapak kuari itu. Defendan kelima tidak memohon kebenaran perancangan sepertimana dikehendaki oleh s 19 Akta Perancang Bandar dan Desa 1976 ('APBD'). Ini disahkan oleh Bahagian Perundangan, Perancangan dan Pengawasan Jabatan Perancang Bandar dan Desa, Semenanjung Malaysia. Sewajarnya, perintah berhenti kerja telah dikeluarkan oleh Majlis Perbandaran Daerah Yan terhadap defendan kelima pada 8 Mac 2006. Walau bagaimanapun, perintah berhenti kerja itu tidak pernah dikuatkuasakan oleh Majlis Perbandaran Daerah Yan. Plaintif-plaintif kesemuanya merupakan penduduk kawasan yang diliputi dalam pelan struktur Majlis Perbandaran Daerah Yan, yang terletak 1–3km dari kuari tersebut. Mereka menegaskan bahawa mereka telah terjejas teruk oleh operasi kuari tersebut. Meskipun beroperasi secara bertentangan dengan APBD, dan tanpa apa-apa kelulusan perancangan, sekitar 19 Februari 2006, operasi peletupan telah bermula di tapak kuari itu. Operasi tersebut telah dijalankan meskipun perintah berhenti kerja dikeluarkan oleh Majlis Perbandaran Daerah Yan pada 8 Mac 2006. Walaupun plaintif-plaintif telah mengemukakan rayuan, pihak berkuasa telah membenarkan kuari itu meneruskan operasinya. Sewajarnya, plaintif-plaintif telah memfailkan saman pemula ini memohon, antara lain, deklarasi di bawah A 15 k 16 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') bahawa kelulusan projek kuari defendan keenam adalah terbatal dan tidak sah. Kesemua defendan kemudian telah memfailkan permohonan-permohonan di bawah A 18 k 19 KMT untuk membatalkan saman pemula plaintif-plaintif. Defendan-defendan telah banyak bergantung kepada alasan-alasan berikut: (a) plaintif-plaintif telah menggunakan prosedur salah di mana mereka sepatutnya telah memohon untuk semakan kehakiman di bawah A 53 dan bukan untuk deklarasi di bawah A 15 k 16; dan (b) plaintif-plaintif tidak mempunyai locus standi untuk memulakan tindakan ini kerana mereka tidak

A mempunyai apa-apa kepentingan sebagai tuan punya sah ke atas tanah dalam kawasan kuari itu. Mahkamah Tinggi setelah mendengar hujah-hujah tentang prosedur salah dan locus standi, telah membenarkan permohonan-permohonan tersebut. Dengan bantahan terhadap keputusan itu, rayuan plaintif-plaintif ke Mahkamah Rayuan telah dibenarkan. B Defendan-defendan telah memohon kebenaran ke Mahkamah Persekutuan. Persoalan yang dikemukakan, bagaimanapun, hanya berkisarkan tentang pembatalan dan prosedur A 53 KMT. Persoalan tentang locus standi tidak ditimbulkan. Mahkamah Persekutuan telah menolak permohonan untuk kebenaran itu, dan untuk alasan ini kes telah dipindahkan balik ke C Mahkamah Tinggi untuk perbicaraan saman pemula berdasarkan meritnya. Plaintif-plaintif telah memohon kepada mahkamah untuk menggunakan budi bicaranya di bawah A 33 k 2 KMT untuk menentukan isu tentang kepenyalahan undang-undang yang ditimbulkan dalam saman pemula itu. D Namun defendan-defendan menegaskan bahawa plaintif-plaintif tidak berhak untuk meneruskan isu-isu substantif dalam saman pemula mereka sehingga mereka telah membuktikan locus standi mereka di mahkamah. Plaintif-plaintif berhujah bahawa isu locus standi telahpun ditimbulkan dan dipertimbangkan oleh Mahkamah Rayuan, dan perkara itu res judicata E dan/atau defendan-defendan diestopkan daripada menimbulkan perkara itu di peringkat ini.

Diputuskan, membenarkan permohonan plaintif-plaintif:

F (1) Plaintif-plaintif dan defendan-defendan telah menyuarakan sepenuhnya hujah-hujah mereka tentang locus standi di Mahkamah Tinggi dan Mahkamah Rayuan. Mahkamah Tinggi telah membenarkan permohonan pembatalan oleh defendan-defendan berdasarkan prosedur salah yang digunakan. Mahkamah Rayuan telah G mempertimbangkan isu locus standi dan mendapati bahawa ia melibatkan pertikaian faktual, yang menyebabkan perkara ini tidak sesuai untuk dibatalkan. Mahkamah Persekutuan tidak membenarkan permohonan untuk kebenaran defendan-defendan, dan dalam apa keadaan locus tidakpun dinyatakan sebagai alasan untuk kebenaran H atau sebagai persoalan untuk ditentukan oleh mahkamah. Tindakan meninggalkan perkara locus oleh defendan-defendan membentuk penerimaan fakta bahawa plaintif-plaintif sememangnya mempunyai locus untuk memulakan tindakan ini. Penerimaan ini tidak boleh ditarik balik dan bertentangan dengan kedudukan yang diambil I sekarang (lihat perenggan 20 & 30).

(2) Isu tentang nilai ambang locus standi telah disuarakan sepenuhnya dalam permohonan-permohonan pembatalan defendan-defendan dan rayuan, res judicata berikutnya, atau isu estopel (yang merupakan

res judicata dalam maksud yang lebih luas) akan menghalang defendan-defendan daripada sekali lagi menimbulkan isu locus standi (lihat perenggan 36).

(3) Ujian tentang nilai ambang locus standi adalah bahawa pemohon hendaklah 'adversely affected'. Dalam tindakan undang-undang awam yang dimulakan di bawah A 15 k 16 KMT, ujian sama tentang nilai ambang locus standi juga akan terpakai. Hanya dalam kes yang paling jelas iaitu, di mana pemohon tiada kepentingan langsung, boleh dikatakan bahawa pemohon tiada nilai ambang locus. Sebaliknya, perkara tersebut patut didengar secara keseluruhan dengan pertimbangan utama tentang keseriusan pelanggaran badan awam. Di mana terdapat kepenyalahan undang-undang, ketidaksahan perbuatan pihak berkuasa awam mengatasi apa-apa bantahan tentang ketiadaan locus pemohon (lihat perenggan 42, 46 & 50).

(4) Plaintif-plaintif bukan semata-mata penyibuk seperti yang ditegaskan oleh defendan-defendan. Mereka juga bukan semata-mata individu berkepentingan awam atau bersemangat rakyat. Prima facie, mereka merupakan orang yang mempunyai kepentingan peribadi dalam kesahan tindakan yang dipersoalkan. Mereka terangkum dalam kelas individu-individu yang ingin dilindungi oleh pelan struktur: mereka yang mempunyai rumah, dusun atau sawah padi dalam kawasan itu, yang mana sumber air mereka adalah sungai yang mengalir ke kawasan itu di mana hutan merupakan kawasan tadahan air yang penting. Mereka khususnya terangkum dalam kelas individu-individu yang dilindungi oleh Akta Perancang Bandar dan Desa. Plaintif-plaintif juga menunjukkan bukti air dari sungai Badong dan Singkir yang dicemari oleh pepejal yang terapung. Hak terhadap alam sekitar yang sihat dan bebas daripada pencemaran dan hak pencarian hidup yang berpatutan (khususnya berkaitan dengan plaintif-plaintif kedua, ketiga, keempat dan kelima) merupakan hak-hak perlembagaan yang penting (lihat perenggan 60, 61(a) & 72).

(5) Kepenyalahan undang-undang dalam kes ini adalah jelas. Seksyen 22(4) APBD jelas bermaksud bahawa tiada pembangunan patut dilaksanakan jika ia bertentangan dengan pelan struktur. Dalam kes ini, melampaui s 22(4), pelan struktur itu sendiri telah diwartakan dan oleh itu mempunyai kuasa undang-undang. Petikan daripada pelan struktur jelas menunjukkan bahawa Hutan Simpanan Gunung Jerai dan Sungai Singkir hendaklah dikekalkan. Bagaimana boleh defendan-defendan menjustifikasikan kelulusan, kewujudan dan operasi kuari pada tapak tersebut yang mana pelan struktur itu telah nyatakan sebagai dilindungi? (lihat perenggan 74).

(6) Setelah membuktikan kes prima facie kepenyalahan undang-undang, beban sebenarnya terletak ke atas defendan-defendan, iaitu

defendan-defendan pertama hingga keempat untuk menunjukkan bahawa tindakan-tindakan mereka adalah sah. Seksyen 19 APBD juga jelas menyatakan bahawa tiada pembangunan boleh diteruskan tanpa kelulusan perancangan dan ia disahkan, bukan hanya defendan-defendan kelima dan keenam gagal memohon untuknya, tetapi kini menjalankan operasi tersebut bertentangan dengan perintah berhenti kerja defendan kedua. Berdasarkan alasan-alasan berikut, defendan hendaklah diestopkan menurut prinsip-prinsip res judicata kerana sekali lagi menimbulkan isu locus standi dalam perkara ini (lihat perenggan-perenggan 75–77).]

Notes

For cases on locus standi in general, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4669–4741.

Cases referred to

Azizan bin Osman & Ors v Kerajaan Negeri Kedah & Ors [2009] 5 CLJ 401, CA (refd)

Chong Sui Jin & Ors v Jeramas Sdn Bhd & Anor [2008] 4 MLJ 701, CA (refd)

Environmental Defence Society v South Pacific Aluminium Ltd (No 3) [1981] 1 NZLR 216, CA (refd)

Gouriet v Union of Post Office Workers & Ors [1977] 3 All ER 70, HL (refd)

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)

Hoong Chin Wah v Cheah Kum Swee & Anor [1967] 1 MLJ 163, FC (refd)

Hoystead & Ors v Taxation Commissioner [1926] AC 155, PC (refd)

Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd [1982] AC 617, HL (refd)

Ipoh Town Council & Anor v Ng Khoon Khoon (No 2) [1960] MLJ 227, CA (refd)

Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals [1997] 3 MLJ 23; [1997] 4 CLJ 253, CA (refd)

Kingdom of Spain v Christie Manson & Woods Ltd & Anor [1986] 3 All ER 28, Ch D (refd)

Kumari Shrilekha Vidyarthi v State of UP (1991) 1 SCC 212 (refd)

Lim Cho Hock v Government of the State of Pertak, Menteri Besar, State of Perak and President, Muncipality of Ipoh [1980] 2 MLJ 148, HC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1, FC (refd)

O'Reilly v Mackman & Ors and other cases [1983] 2 AC 237, HL (refd)

Pengarah Tanah Dan Galian, Wilayah Persekutuan [In this case the appellant in the appeal was the Land Executive Committee, and not, as stated in the appeal record, the Pengarah Tanah dan Galian however, the parties made nothing of this, presumably because the government agree that whoever is cited as appellant the government will be bound if the appellant loses — Mng Ed MLJ] v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164; [2006] 2 CLJ 532, CA (refd)
Shahidan bin Shafie v Atlan Holdings Bhd & Anor [2005] MLJU 279; [2005] 3 CLJ 793, CA (refd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177, FC (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)
Tok Jwee Kee v Tay Ah Hock & Sons Ltd & Town Council, Johore Bahru [1969] 1 MLJ 195, FC (refd)
Woon Tan Kan v Asian Rare Earth Sdn Bhd [1992] 3 CLJ (Rep) 786, HC (refd)

Legislation referred to

National Forestry Act 1984 s 10
National Forestry (Adoption) Enactment 1985 s 13(1)(b)
Rules of the High Court 1980 O 15 r 16, O 18 r 19, O 33 r 2, O 53
Town and Country Planning Act 1976 ss 9, 9(1)(b), (2), (3), 10(6), (7), 11, 19, 22(4)
Town Boards Enactment s 145

Sarguna Kumaari Munusamy (Jessica, Theiva & Kumaari) for the plaintiffs.
Anas Ahmad Zaki (State Legal Counsel, Kedah) (Rafeah Yusof, Federal Counsel) for the first and fourth defendants.
Tan Beng Hong (Sharifah Thauhirah Osman & Associates) for the fifth defendant and mention for the second defendant's counsel.
S Kanaga Sundran (Raja Seelan & Associates) for the sixth defendant.

Zamani A Rahim JC:

THE PLAINTIFFS' ORIGINATING SUMMONS

[1] By an originating summons dated 17 April 2006, encl 1, the plaintiffs sought the following reliefs and remedies. As against the first to fourth defendants, the plaintiffs prayers are for the declarations under O 15 r 16 of the Rules of the High Court 1980 ('the RHC') which are as follows:

(a) a declaration that the approval of the sixth defendant's quarry project by the Majlis Mesyuarat Kerajaan Negeri Kedah Darul Aman dated 12 September 2001, Kertas No 7(E) 159/2001 ('the approval') is null and void;

(b) a declaration that the first defendant's purported declaration under s 13(1)(b) of the National Forestry (Adoption) Enactment 1985 in Kedah State Gazette No 19, Statement No 312, Vol 45 pertaining to the cessation of Lot PT 36, Daerah Yan, Mukim Singkir with an area of 40.49 hectares ('the site') as part of the Gunung Jerai forest reserve is null and void;

(c) a declaration that the site is a water catchment forest under s 10 of the National Forestry Act 1984;

(d) a declaration that the approval of the environmental impact assessment report submitted on behalf of the fifth defendant in relation to the quarry project by the third defendant is null and void;

(e) a declaration that the 30-year lease of the site granted to the fifth defendant by the fourth defendant is null and void;

(f) a declaration that the quarry operations on the site or any part thereof are illegal.

As well as orders against the defendants as follows:

(g) an order requiring the second defendant forthwith to issue a stop work order against the fifth defendant and the sixth defendant;

(h) an injunction to restrain the fifth defendant whether by itself, its servants or agents or otherwise howsoever from continuing its operations at the site;

(i) an order requiring the fifth defendant at its own cost whether by itself, its servants or agents or otherwise to take all works to restore the site as far as possible to the condition it was in before the development commenced and to protect the site from soil erosion and reinstate all boundary markers that may have been removed, dislodged and/or are missing, to the satisfaction of an engineer to be appointed at the sole discretion of the plaintiffs, with the fees and disbursements incurred by such appointment to be borne by the fifth defendant;

(j) an order requiring the fifth defendant at its own cost by itself its, servants or agents or otherwise to take all works to restore Sungai Singkir and its tributaries from which the plaintiffs herein or any one of them obtain their water supply as far as possible to the condition they were in before the development commenced so as to cause the water in the river and the said tributaries to flow with the same pressure and in a state as pure as that which it flowed previously to the commencement of the fifth defendant's development;

(k) an order requiring the fifth defendant at its own cost whether by itself, its servants or agents or otherwise to take all works to restore Sungai Badong and its tributaries from which the plaintiffs herein or any one of them obtain their water supply as far as possible to the condition they were in before the development commenced so as to cause the water in the river and the said tributaries to flow with the same pressure and in a state as pure as that which it flowed previously to the commencement of the fifth defendant's development;

(l) an injunction to restrain the sixth defendant whether by itself, its servants or agents or otherwise howsoever from continuing its operations at the site;

(m) an order requiring the sixth defendant at its own cost whether by itself, its servants or agents or otherwise to take all works to restore the site as far as possible to the condition it was in before the development commenced and to protect the site from soil erosion and reinstate all boundary markers that

may have been removed, dislodged and/or are missing, to the satisfaction of an engineer to be appointed at the sole discretion of the plaintiffs, with the fees and disbursements incurred by such appointment to be borne by the sixth defendant;

(n) an order requiring the sixth defendant at its own cost whether by itself, its servants or agents or otherwise to take all works to restore Sungai Singkir and its tributaries from which the plaintiffs herein or any one of them obtain their water supply as far as possible to the condition they were in before the development commenced so as to cause the water in the river and the said tributaries to flow with the same pressure and in a state as pure as that which it flowed previously to the commencement of the fifth defendant's development;

(o) an order requiring the sixth defendant at its own cost whether by itself, its servants or agents or otherwise to take all works to restore Sungai Badong and its tributaries from which the plaintiffs herein or any one of them obtain their water supply as far as possible to the condition they were in before the development commenced so as to cause the water in the river and the said tributaries to flow with the same pressure and in a state as pure as that which it flowed previously to the commencement of the fifth defendant's development;

(p) an order requiring against the first defendant to gazette the site as a water catchment forest under s 10 of the National Forestry Act;

(q) an order that the registrar of titles Kedah give effect to the declaration under (e) above and to expunge from his records the 30-year lease wrongfully granted to the fifth defendant;

(r) an order requiring the fifth defendant to surrender the site to the fourth defendant;

(s) damages to be assessed and the plaintiffs be entitled to give evidence of loss and damage by way of affidavits at the assessment hearing;

(t) interest; and

(u) such further and other relief that this honourable court deems fit to grants.

BACKGROUND FACTS

[2] The plaintiffs' claims are premised on the following *undisputed facts* and which are set out in encl 1 as well as the supporting affidavits of the plaintiffs viz encls 4–10, 27 and 64:

(a) On or about the 16 December 1997, the first defendant assented to the structure plan for the district of Yan from 1995–2020 and the same was gazetted on 1 January 1998 (encl 27).

(b) According to the structure plan, the Gunung Jerai Forest Reserve should be preserved as a water catchment forest and any activity which

A can destroy the natural environment and affect the supply of clean water is not allowed (p 67, encl 27). The structure plan further states a specific commitment to the inhabitants of the Yan district council involved in agricultural activities in the area to exploit the fruit orchards and farms as commercial ventures. In gist, the area in question is B recognised as environmentally sensitive and being an area that must be maintained as a water catchment area, for flood prevention, to ensure a clean supply of water to the surrounding communities and for the protection of the area as a whole which has a large farming community, part of the 'Jelapang Padi Negara'. The rivers in the area are to be C protected and specifically mentioned is Sungai Singkir.

(c) Under s 22(4) of the Town and Country Planning Act 1976, any development to be carried out must be in compliance with the structure plan.

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(d) On or about 12 September 2001, the first defendant granted the approval for a quarry on a 100 acre site in Gunung Jerai (p 82 & 87, encl 27).

(e) Consequently, the first defendant declared the quarry site as ceasing to E be a forest reserve with effect from 10 October 2001 (p 91, encl 27).

(f) The fifth defendant was accordingly given a 30 year lease on or about the 15 April 2002 of the site by the fourth defendant (p 37, encl 27).

(g) The sixth defendant is the quarry operator. F

(h) The third defendant approved an environmental impact assessment (EIA) for the quarry project sometime in 2005.

(i) In the quarter of 2006, blasting operations began at the quarry site.

G (j) The fifth defendant had not applied for planning permission as is required under s 19 of the TCPA. The legal, planning and monitoring section of the Town and Country Planning Department, Peninsular Malaysia confirmed that the quarry was operating in contravention of the structure plan and without planning permission.

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(k) A stop work order was issued by the Yan District Council against the fifth defendant on 8 March 2006. However the said stop work order was never enforced by the Yan District Council.

I **[3]** That much is common ground.

[4] The plaintiffs are all inhabitants of the area covered in the structure plan of the Yan District Council. They contend that they are residents, and/or registered or beneficial owners of properties surrounding the site and also

undertake agriculture activities thereon. They are inhabitants of two villages, Kampung Singkir Genting and Kampung Badong, which are located within the 1–3km of the quarry.

[5] They contend that they have been adversely affected by the operations of the quarry as:

(a) For some of them, their sources of livelihood (fruit trees, padi yields) have been lost or affected;

(b) For all of them, important sources of water (Sungai Singkir and/or Sungai Badong) for their daily needs and/or agriculture needs have been polluted;

(c) For most of them, the enjoyment or use of land which they occupy has been distributed by dust, vibrations, smut and pollution from the blasting activities of the quarry;

(d) In mid 2004, vast mud floods occurred at the villages surrounding the applicants' quarry site, including Kampung Singkir Genting, Singkir Darat, Singkir Bedong and Singkir Laut due to soil erosion at the quarry site. As a result the mud flow inundated almost the entire water catchment of the area. Due to siltation and sedimentation at the rivers, the river water became muddy and the rivers became much narrower and more shallow. Prior to the activities at the quarry site, the villagers had never experienced mud floods or the condition of the rivers like this.

[6] As a result of complaints made by the residents of the affected villages and several non-governmental organisations as well as the coverage of the issue by newspapers, the sixth defendants were instructed to commence reparatory works. At this point in time the Department of Environment issued a statement that the environmental impact assessment (EIA) for the project had yet to be approved.

[7] Since 2004, the plaintiffs, through the assistance of some nongovernmental organisations, brought to the attention of the various authorities their concerns and complaints about the alleged illegalities, and in particular the violation of the structure plan and the Town and Country Planning Act.

[8] Despite operating in contravention of the TCPA, and without any planning permission, on or about 19 February 2006, blasting operations then began on the quarry site. The operations carried on despite the stop work order issued by the Yan District Council on 8 March 2006.

[9] Despite the plaintiffs' appeals, the authorities allowed the quarry to continue its operations. The plaintiffs accordingly sought the assistance of this honourable court for the reliefs and remedies prayed, by way of this originating summons filed on 17 April 2006 (encl 1).

[10] All the defendants then filed applications to strike out the plaintiffs' originating summons. All the applications by the defendants were filed under O 18 r 19 of the RHC 1980.

[11] In essence, the applications filed by the first, second, fourth, fifth and sixth defendants relied substantially on the following grounds:

(a) the plaintiffs invoked the *wrong procedure* in that they should have applied for judicial review under O 53 and not for a declaration under O 15 r 16; and

(b) the plaintiffs have no *locus standi* to bring this action as they do not have any legal proprietary interest in the lands the vicinity of the quarry.

[12] All parties prepared written submissions in relation to the striking out applications, which was finally decided by the High Court in favour of the defendants on 12 December 2006. Full arguments were put forward on both the grounds above, ie wrong procedure and locus standi. The grounds of learned judge's decision was mainly that the plaintiffs had invoked the wrong procedure.

[13] The plaintiffs appealed to the Court of Appeal. The appeal was heard on 14 December 2008. One again, both in written and oral submissions, parties addressed both the issues of wrong procedure and locus standi. The Court of Appeal, having considered all arguments put forward, found that this was not a suitable case for striking out and allowed the appeals (see *Azizan bin Osman & Ors v Kerajaan Negeri Kedah & Ors* [2009] 5 CLJ 401).

[14] The defendants applied for leave to the Federal Court. The questions that they framed, however, were only centered on striking out and the O 53 procedure, and the question of locus standi was not raised at all.

[15] The Federal Court dismissed the application for leave, and for this reason the case was returned to the High Court for a hearing of the OS on its merits.

[16] On 9 September 2009, the plaintiffs had applied to the court to exercise its discretion under O 33 r 2 of the RHC to determine the issue of

illegality raised by the OS, as this was clearly as issue of law which fell within the purview of the rule, and a decision on which would result in a substantial saving of time and expenditure.

[17] The defendants objected vehemently and insisted that the plaintiffs are not entitled to proceed with the substantive issues in their OS until they have proved their locus standi before the court. For this, cross-examination is required.

[18] Essentially, the defendants' submissions are:

(a) to object to the plaintiffs' application to have the question of illegality heard as a preliminary point of law; and

(b) to assert that the plaintiffs have to first prove their locus before the court can proceed to hear the OS.

WHETHER THE DEFENDANTS CAN REVISIT THE ISSUE OF LOCUS — ABANDONMENT AND ISSUE ESTOPPEL

[19] The plaintiffs submit that the issue of locus standi of the plaintiffs has been raised and considered by the Court of Appeal, and the matter is res judicata and/or the defendants are estopped from raising the point at this stage.

[20] As stated above, the plaintiffs and defendants fully ventilated their arguments on locus standi at the High Court and the Court of Appeal. The High Court allowed the striking out application by the defendants on the basis that wrong procedure was used. The Court of Appeal considered the issue of locus standi and found that it involved factual disputes, which resulted in the matter being unsuitable for striking out. The Federal Court did not allow the defendants application for leave, and in any event, locus was not even stated as a ground for leave, or as a question for the determination of the court.

[21] The essence of the determination of the Court of Appeal and the Federal Court are that the plaintiffs are entitled to proceed with their application for the remedies which they seek.

[22] What the defendants are in fact seeking to do is to reopen the argument that the plaintiffs do not have the locus to bring this matter.

[23] In their applications for striking out before the High Court, submissions were made by the sixth respondent (with whom the rest of the

respondents, save the third respondent, concurred) wherein the following grounds were raised in support of their striking out application, that:

(a) the plaintiffs should have proceeded by way of judicial review;

(b) there was inordinate delay in this application;

(c) the plaintiffs lacked good faith in filing the OS;

(d) the plaintiffs lacked locus standi; and

(e) the plaintiffs should have proceeded by way of writ procedure.

[24] His honourable judge allowed the defendants' application, giving as reasons for his decision that the plaintiffs should have proceeded under O 53. Although he did not make a specific finding on the locus standi point, the plaintiffs submitted that his silence amounted to a rejection of this argument.

[25] Before the Court of Appeal, the counsel for the sixth defendant submitted and all other defendants concurred with his submission. The points that were submitted before the Court of Appeal largely centered on the argument that proceedings should have been taken under O 53 of the Rules of the High Court, but also included the question of the plaintiffs locus standi.

[26] The plaintiffs' submissions and the sixth respondent's submissions before the Court of Appeal in Civil Appeal No: K-01–147 of 2006 are attached in p 98 of the plaintiffs bundle (the other respondents had relied on the sixth respondent's submissions), and the judgment of the Court of Appeal was reported vide *Azizan Osman & Ors v Kerajaan Negeri Kedah & Ors* [2009] 5 CLJ 401 where the Court of Appeal held:

> Learned counsel for the sixth respondent submitted to this court that the appeal should be struck out with costs and his arguments can be summarised in the following manner for it was alleged that:
>
> ...
>
> (iv) The appellant had no locus standi as none of the appellants were registered or beneficial owners of the land adjoining the site;
>
> And further down ... 'Further Ms Meenakshi Raman submitted that the appellants are beneficial owners of the land and that they are staying within the vicinity of 1–3km of the site. Learned counsel for the first respondent however said that the appellants are not the land owners.
>
> It could therefore be observed that there are some facts which are in dispute.
>
> It is therefore the unanimous view of the court that this is not a plain and obvious case that can be disposed off by way of O 18 r 19 of the Rules of the High Court 1980.

...

After considering the pleadings and after hearing the submission of learned counsel for both sides, we are satisfied that the appellant have raised some important issues which may only be resolves through a full hearing.

[27] In their application for leave to the Federal Court, the defendants put forward several issues of law for the court's determination, all in relation to O 53, the principle in *O'Reilly v Mackman & Ors and other cases* [1983] 2 AC 237, striking out under O 18 r 19 in a claim based on public law, and multiplicity.

[28] Clearly, the defendants abandoned the locus standi point at the Federal Court. This is clear from the fact that they dropped this point from their application for leave to the Federal Court.

[29] Having abandoned the locus standi point at the Federal Court, the defendants cannot now raise it again. The defendants first raised the point within the striking out application, and it was their duty to pursue the matter until a decision on the point was obtained. The Federal Court stated in the case of *Hoong Chin Wah v Cheah Kum Swee & Anor* [1967] 1 MLJ 163 at p 166D left.

With regard to the plea of undue influence Their Lordship are of the opinion that in as much as the plea was not pressed in the courts below, with the result that there is neither specific evidence nor any direct finding with regard to it, they are absolved from the necessity of dealing with the matter in detail now. It is manifest from the proceedings that it was open to the appellant to have urged the plea in the courts below to an issue, in other words to have claimed and obtained a judicial decision upon it. The appellant omitted to do this and it is therefore quite impossible in Their Lordships' opinion on the materials available to them to set aside the judgment appealed against and to affirm the plea of undue influence.

[30] The abandonment of the locus point by the defendants amount to an admission of fact that the plaintiffs do have sufficient locus to bring this action. This admission cannot be withdrawn and a contrary position now taken. See *Hoystead & Ors v Taxation Commissioner* [1926] AC 155 at pp 165–166 where in it was stated:

In the opinion of Their Lordships, it is settled, first, *that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view to obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact*. Parties are not permitted to begin litigations because of new views they may entertain of the law of the case, or new versions which they present as to what

A should be a proper apprehension by the court of the legal result either as to what should be a proper apprehension by the court of the legal result either of the construction of documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant
B authority reiterating that principle. Thirdly, the same principle — namely, that of setting to rest rights of litigations, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light of ingenuity might suggest some traverse which had not been taken. The same principle of setting parties'
C rights to rest applies and estoppel occurs.

[31] And at p 170:

D It is seen from this citation of authority that if any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision... Williams J in *Howlett v Tarte* said: 'I think it is quite clear upon the authorities to which our attention has been called, and upon principle, that, if the defendant
E attempted to put upon the record a plea which was inconsistent with any traversable allegation in the formal declaration, there would be an estoppel'.

[32] The defendants state at para 3.6 of their submissions that the High Court struck out the OS as an abuse of process for noncompliance with
F O 53. But according to the plaintiffs, what the defendants have failed to mention is that the issue of locus standi was fully ventilated before the High Court and the Court of Appeal.

[33] The striking out procedure under O 18 r 19 is a suitable procedure by
G which a challenge to locus standi can be made, provided it is a plain and obvious case. If the plaintiffs were unable to satisfy the simple test of threshold locus standi, as set out in the *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 2 CLJ 532 then this would have
H been a suitable case for striking out under O 18 r 19 of the RHC.

'Threshold locus standi refers to the right of a litigant to approach the court in relation to the facts which form the substratum of his complaint. It is usually tested upon an application by the defendant to have the action struck out on the ground that the plaintiff, even if all that he alleges is true, cannot seek redress in the court'
I per Gopal Sri Ram JCA in *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals* [1997] 3 MLJ 23; [1997] 4 CLJ 253, at p 276.

[34] The plaintiffs submit that the Court of Appeal, by not striking out the matter, has by implication decided that the plaintiffs do have threshold locus

standi, and the fact that the case was remitted back to the High Court to be heard on its merits supports this contention.

[35] In *Shahidan bin Shafie v Atlan Holdings Bhd & Anor* [2005] MLJU 279; [2005] 3 CLJ 793 which was a private law action, one of the appeals concerned an application to strike out. Gopal Sri Ram JCA (as he then was), in considering the rule as to threshold standing in a private law (as opposed to a public law) action, held (at p 802–803):

> Before I move to the second issue there is a proposition central to the determination of locus standi. It is this. When determining whether a particular plaintiff has locus standi in a given set of circumstances the court must consider the action in two stages. At the first stage ('the threshold stage') assume that the fact pattern asserted by the plaintiff is true. It is just like a case of striking out a pleading for want of a cause of action or defence under RHC O 18 r 19(1)(a) where the court is confined to the pleading and not to extrinsic matters. It does not matter whether the plaintiff may ultimately fail in his action on the merits. Failure or success must be considered at the second stage ('the merits stage'). If a plaintiff is found to lack standing to sue then his action fails in limine at the threshold stage and there is no inquiry into the merits of the given case.

[36] The issue of threshold locus standi having fully ventilated in the defendants' striking out applications and subsequent appeal, res judicata, or issue estoppel (which is res judicata in its wider sense) would prevent the defendants from once again raising the issue of locus standi.

[37] If I am wrong that the plaintiffs is estopped from raising the issue of locus standi, I will next consider whether the defendants is at liberty to regurgigate the issue whether the plaintiffs have locus standi.

WHETHER THE PLAINTIFFS HAVE THRESHOLD LOCUS STANDI

[38] The plaintiffs' application is for declaratory orders, injunction and consequential orders in the realm of public law, as the plaintiffs challenge the legality of various approvals of government and public authorities.

[39] The issue of locus standi is whether the plaintiffs herein have the ability to institute and maintain the proceedings before this court for the relief sought.

[40] The focus of the question what is the test to be applied in relation to the locus standi needed to challenge transgressions of the state and public authorities that the plaintiffs complain about, in seeking the remedy of declaration and injunction.

[41] The test of locus standi which should be applied following amendments to our O 53 of the RHC in 2000 is as stated in the Court of Appeal case of *QSR Brands Bhd*, Gopal Sri Ram JCA (as he then was).

> Under the former O 53, the only remedies available were the prerogative orders of certiorari, prohibition and mandamus. The remedies of declaration and injunction could not be claimed under O 53. If you wanted a declaration that a particular administrative act was invalid, then O 15 r 16 had to be resorted; the proceeding had to be commenced either by writ or originating summons. Or if you wanted to restrain by injunction a public decision maker from pursuing a particular course of conduct, you had to resort to O 29 and here too you had to either take out a writ or originating summons. *The procedural lacuna in the public law environmental produced immense locus standi difficulties for an applicant seeking relief*. The problem was one of classification. *Declaration and injunction were classified by courts as private law remedies only to be obtained in a public law action or proceeding by the Attorney-General or upon his relator. So, the test for threshold standing in private law was very strict*.
>
> (At p 541) ... By contrast, certiorari and the other prerogative remedies were classified as public law remedies which permitted a far more liberal threshold locus standi test to be met ... *It is to rid this dichotomous approach which often produced injustice in that O 53 in its present form was introduced*.

[42] As set out by the *QSR Brands Bhd*, (at p 541 of the case), There is single test of threshold locus standi for all remedies that are available under the order. It is *that the applicant should be* 'adversely affected'. *The phrase calls for a flexible approach*. It is for the applicant to show that he falls within the factual spectrum that is covered by the word 'adversely affected'.

[43] The 'adversely affected' person's test is the correct test to be applied in our instant case is further fortified by the dissenting judgment of His Lordship Abdoolcader in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, which is now highly relevant since the liberalising of standing under the dissenting judgment review procedure in our present O 53. His Lordship had applied the English decisions decided after the changes to O 53 in England, prior to our own reforms to O 53. He has this to say (p 44H of the case).

> I do not see that the English O 53 as enacted in its present form makes any distinctive difference to affect the position.

[44] What is being 'adversely affected'? The Court of Appeal in the *QSR Brands Bhd*, at p 541 said as follows

(a) *Applicant has sufficient personal interest in legality of action impugned*

At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned ... this includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense has been or is being or is about to be infringed. *In all cases, the court must, ex debito justiciae, grant the applicant threshold standing*.

(b) *Where nexus between applicant and person challenged is NOT tenuous*.

At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as de minimis. In the middle of the spectrum are cases which are in the nature of public interest litigation.

(c) In an ordinary case, if on a reading of the application for leave to issue judicial review *the court is satisfied that the applicant has neither a sufficient personal interest in the legality of the impugned action in the sense already discussed*, nor is application a public interest litigation, then *leave may safely be refused* on the ground that the applicant is not a person 'adversely affected.

THRESHOLD LOCUS AS OPPOSED TO SUBSTANTIVE LOCUS/ILLEGALITY

[45] Further, at this stage of inquiry, as stated by the Court of Appeal in the *QSR Brands Bhd*'s case (at p 539), what is required by the court is to only establish 'threshold locus standi' — ie does the applicant have a legitimate grievance? 'Threshold locus' is to be distinguished from 'substantive locus standi'. The latter is to be determined by the court at the very end of the case, when it comes to decide whether on facts and circumstances (the merits), the court's discretion ought to be exercised in favour of the applicant.

THE TWO STAGE TEST APPLIES IN PUBLIC LAW ACTIONS, WHETHER UNDER O 53 OR O 15 R 16 OF THE RHC

[46] In a public law action brought under O 15 r 16 of the RHC, the same test of threshold locus standi will also apply. In *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals* [1997] 3 MLJ 23; [1997] 4 CLJ 253, Gopal Sri Ram JCA (as he was then) held (at p 276 (CLJ)):

> In public law — and, in so for at least as the appellants in the first and second appeal are concerned, the summons in the present instance lies in public law — there are two kinds of locus standi. The first is the initial or threshold locus standi; the second is the substantive locus standi.

> *Threshold locus standi* refers to the right of a litigant to approach the court in relation to the facts which form the substratum of his complaint. It is usually tested upon an application by the defendant to have the action struck out on the ground that the plaintiff, even if all that he alleges is true, cannot seek redress in the courts.
>
> Although a litigant may have threshold locus standi in the sense discussed, he may, for substantive reasons, be disentitled to declaratory relief. This, then, is substantive locus standi. The factors that go to a denial of substantive locus standi are so numerous and wide ranging that it is inappropriate to attempt an effectual summary of them. Suffice to say that they range from the nature of the subject matter in respect of which curial intervention is sought to those settled principles on the basis of which a court refuses declaratory or injunctive relief.

[47] In the more recent case of *Chong Sui Jin & Ors v Jeramas Sdn Bhd & Anor* [2008] 4 MLJ 701, the facts are these. The ten appellants were the registered owners of seven shophouses. The shophouses had been built on the basis that several parcels of land, which were clearly identified were to be expressly reserved to be maintained as public spaces and/or car parks. It was on this basis that the shophouses were sold to the respective purchasers. The land was vested in the Majlis Perbandaran Tawau in trust to keep the same open or control the use of the same for the appellants. The council later entered into a joint venture agreement with the defendant and another company to develop the land into commercial shop lots for commercial gains on a joint venture basis. The council approved the two developments submitted by the companies in respect of the land and the two companies subsequently commenced work thereon. The plaintiffs claimed that they had acquired a common right to the use and enjoyment of the land and exercised their private citizen's right to sue by commencing two suits in the High Court. The plaintiffs filed for injunctions against the defendants and parties agreed that the issue of locus standi of the appellants be addressed first.

[48] The Court of Appeal referred to *Kajing Tubek*, and held that 'the issue of locus standi raised in this appeal related to the threshold locus standi and not the substantive locus standi' (at p 711).

[49] The court further considered the law in *Lim Cho Hock v Government of the State of Pertak, Menteri Besar, State of Perak and President, Muncipality of Ipoh* [1980] 2 MLJ 148 (HC); *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177; and *Lim Kit Siang* and concluded (at p 714):

> In the instant case the learned judicial commissioner was of the view that as general ratepayers in the municipality the plaintiffs' private rights have not been interfered with and that they suffered no special damages peculiar to them. With the greatest respect to the learned judicial commissioner we are of the view that the plaintiffs in the instant case have genuine private interest to be furthered and protected. If the plaintiff in *Lim Cho Hock*'s case who was also a ratepayer within the council

area was held to have a standing to sue the plaintiffs in the instant case should also be held to have a locus standi to sue in these proceedings. Furthermore we are of the view that the plaintiffs in the instant case are in a stronger position than the plaintiffs in *Lim Cho Hock*'s case and *Lim Kit Siang*'s case because the plaintiffs as the registered owners of the properties in Bandar Sabindo within the Tawau Municipal and who are the inhabitants, and users of the public space, public playing grounds, car parks and road reserve at Bandar Sabindo are within a much narrower class of people. Furthermore they are also claiming that s 38 of the Local Government Ordinance gives them the requisite locus standi to sue. In our view the plaintiffs are the persons who are adversely affected by the decision of the Majlis to develop the said land. They have bought the respective shophouses which have been constructed in accordance with the first development plan which clearly identified that the said land had been expressly reserved for public spaces and car parks. It was on that basis that they bought those shophouses. Under the circumstances we are of the view that the court should adopt a fairly lenient view of the plaintiffs' standing to sue in these proceedings.

REFUSAL ONLY IN THE CLEARER OF CASES — LOCUS STANDI NOT TO BECOME A STUMBLING BLOCK IN CASES INVOLVING ILLEGALITIES

[50] What is clear from the cases on the current position of locus standi, is that only in the most obvious cases ie where the applicant has no interest at all, can it be said that an applicant has no threshold locus. Otherwise, the matter should be heard as a whole with the main consideration being the gravity of the transgression of the public body. *Where there has been an illegality, such unlawfulness of the public authority's conduct will override any objections on the lack of locus of the applicant.*

[51] As stated by Lord Wilberforce in the *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 at p 630:

> These may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases, this will not be so. In these, *it is necessary to consider the powers or the duties in law of those against whom relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed ... it must be taken together with the legal and factual context.*

[52] This view has also been fortified by the views of Lord Scarman in the *IRC*'s case at p 653 of the case where he says that:

A It is wrong in law, as I understand the case, for the court to attempt an assessment of the sufficiency of an applicant's interest it is necessary to consider the matter to which the application relates. *If he fails to show*, when he applies for leave, *a prima facie case, or reasonable grounds for believing that there has been a failure of public duty, the court would be in error if it granted leave*. The curb represented by the need B to for an applicant to show, when he seeks leave to apply, that he has a case is an essential protection against abuse of legal process. It enables the court to prevent abuse by busybodies, cranks, and other mischief makers.

C **[53]** His Lordship Abdoolcader J in *Lim Kit Siang*'s case, stated as follows (at p 43F).

[54] The general conclusion to be drawn from the *IRC*'s case is that the majority thought *the issue of standing should usually be considered along with* D *the merits, as it is a now a matter for the court's discretion — the graver the illegality, the less insistence on showing standing*.

I referred in *Tan Sri Hj Othman Saat* ... where *Lord Denning MR* referred to (*IRC*'s case) and *Lord Diplock*'s assertion in the case of *the right of even a single* E *public-spirited taxpayer to bring a matter to the attention of the court to vindicate the rule of law and get unlawful conduct stopped ... Tan Sri Hj Othman Saat* actually involved a private law elements as the plaintiff's grievance there was denial of his application for the land in question and its grant to the defendant who was the Menteri Besar ...

F

[55] As His Lordship said at p 45 of the case:

I am not therefore impressed that the road to relief in regard to public law issues G can be travelled on... with the permission of the Attorney-General. To deny locus standi in the instant proceedings would in my view be a retrograde step in the present stage of development of administrative law and a retreat into antiquity ... *The principle that transcends every other consideration must ex necessitate be that of not closing the door to the ventilation of a genuine public grievance and more particularly where the disbursement of public funds is in issue*, subject always of course to a H judicial discretion to preclude the phantom busybody or ghostly intermeddler. *The effect of denial of standing in such circumstances would be, and it has indeed been so suggested, that we will have to fold our arms and do nothing, in which event I would add we might also as well have to hang our heads in sorrow and perhaps even in mortification in not being able to at least entertain for consideration on its merits any* I *legitimate complaint of a public grievance or alleged unconstitutional conduct*.

[56] To further fortify the position that the issue of locus should never be taken as a threshold issue in complaints of illegality:

> In general in interim stages of proceedings where the breach of a statute has been alleged, technical restrictions on locus standi should not be allowed to prevent litigants bringing such matters to the court's attention. It was not until the nature and scope of the statutory duty in issue has been ascertained, and the nature and quality of its breach (if any) had been found, that it would ordinarily be practicable or right to determine whether a plaintiff had standing to maintain an action. The issue of standing in interlocutory proceedings ought usually to be regarded as seriously triable along with the other issues, unless it could clearly be said that there was no possibility of establishing a breach of duty. See *Consumers Cooperative Society (Manawata) v Palmerston North City Council* [1984] 1 NZLR 1.

[57] The reason being that no court will countenance an illegality. In *Environmental Defence Society v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 at p 220, the Court of Appeal of New Zealand stated:

> The Crown contended that the societies did not have standing to bring these proceedings. We did not regard this contention as precluding the court from examining whether the order in council was lawfully made and, if we had held that it was not, we would not have refused relief on this ground ... They would have the right to appear before the Planning Tribunal under s 8(1)(f) and accordingly have a ligitimate interest in whether the reference to the tribunal is invalid. If it were invalid there might be no need for them to devote expense or time in preparing a case for the tribunal ... Moreover the proceedings challenge the legality of government action. It is unrealistic to expect the Attorney-General to do this and we see no reason why it must be left to individuals directly affected to undertake the burden.

[58] To stress this further, in the local case of *Pengarah Tanah Dan Galian, Wilayah Persekutuan [In this case the appellant in the appeal was the Land Executive Committee, and not, as stated in the appeal record, the Pengarah Tanah dan Galian however, the parties Made nothing of this, presumably because the government agree that whoever is cited as appellant the government will be bound if the appellant loses — Mng Ed MLJ] v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 at p 148 the court said that:

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised or a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen so that the courts can see that these great powers are influence are exercised in accordance with law. I would once again emphasise what has often been said before, that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in place'.

[59] As stated above, the plaintiffs have to satisfy the test of threshold locus standi — ie do the plaintiffs have a legitimate grievance? Substantive locus standi is to be determined by the court at the very end of the case, when it comes to decide whether on facts and circumstances (the merits), the court's discretion ought to be exercised in favour of the plaintiffs.

[60] Applying the law to the facts in this case, it is amply clear that the plaintiffs in this case are not mere busy bodies as contended by the defendants. They are also not mere public interest or public spirited individuals. Essentially the plaintiffs have to show that they are not mere busybodies and the balance here is between encouraging individuals to enforce the law and the undesirability of allowing proceedings to be brought by vexatious or litigious litigants who have no personal interest in the proceedings.

[61] Prima facie, they are persons who have sufficient personal interest in the legality of the impugned action by virtue of the following facts:

(a) They have a private interest by virtue of statute. They specifically come within the class of persons to be protected by the Town and Country Planning Act.

Where statutory rights are involved

> The exception which entitles proceedings to be brought where the interference with a public right is such as to interfere with a private right applies not only to common law but also statutory rights. A person may sue in his own name to ascertain or enforce statutory provisions which, being enacted for his benefits, are considered as conferring upon him a private right:
>
> *Zamir & Woolf: The Declaratory Judgment*, para 5.32

[62] In our case, the plaintiffs have private rights which are accorded to them by the Town and Country Planning Act. In other words, they have private rights that are protected by public law.

(b) In relation to planning legislation, the Federal Court has stated in the case of *Tok Jwee Kee v Tay Ah Hock & Sons Ltd & Town Council, Johore Bahru* [1969] 1 MLJ 195 at p 201. When the council zones an area for residential purposes, the zone benefits not only the inhabitants of the town generally, it benefits in particular the inhabitants of the zone. Persons buying land in the zone are prepared to pay an increased price because of the promise of peace and quiet and the attractions of living in a residential zone.

Further, at p 202, the Federal Court said that 'These provisions also demonstrate, in my view, that the zoning provisions in the enactment are for the special benefit of persons living or owning lands in zoned areas'.

In this case, the appellant had raised an objection against the approval of the neighbour's plans to construct shophouses in a residential area. The Federal Court then went on to hold: the town council is liable to the appellant if in breach of the outright prohibition of s 145 of the Town Boards Enactment if passed the neighbour's building plan when it was not in conformity with the approved town plan and such breach results in damage to the plaintiff.

(c) Further, the structure plan itself is a piece of subsidiary legislation. For the purpose of clarity, below are the steps of how a structure plan comes into force:

(i) preparation of the draft structure plan under s 9 of the TCPA by the state director;

(ii) invitation for public commentary under s 9(2) and (3) of the TCPA.

(iii) the draft structure plan is approved by the state planning committee which then submits it to the state authority for the latter's assent. Upon the assent of the state authority, the plan will come into effect: Section 10(6) of the TCPA.

(iv) The committee shall cause the fact of the assent of the state authority to a draft structure plan to be published in the state gazette: Section 10(7) of the TCPA.

[63] When a structure plan is gazetted, it is then clothed with the authority of subsidiary legislation. See *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 at p 51 wherein the Federal Court stated '... the structure plan has legal status and cannot be disregarded'.

[64] Here the very reason for the preservation of Gunung Jerai Forest Reserve is the importance primarily, of the forest as a water catchment area to the surrounding communities. The structure plan (exh P8, in encl 27) states:

3.4.5 Alam Sekitar: Strategi Utama:

Mengekalkan kawasan-kawasan alam semulajadi bagi kepentingan tadahan air, sungai-sungai, rekreasi, pelancongan, ekologi dan untuk mengawal hakisan tanah dan banjir kilat. (page 64, encl 27).

3.5.7 Kawasan Hutan Simpan dan Pertanian

47: Kawasan hutan simpan tidak boleh dibangunkan untuk sebarang pembangunan kecuali untuk tujuan pelancongan dan rekreasi. Bagaimanapun pembangunan pelancongan yang dibenarkan mestilah tidak menimbulkan masalah alam sekitar dan pembangunannya dijalankan secara teliti dan terancang.

48: *Selain dari itu, kawasan-kawasan pertanian sedia ada di sekitar kaki Gunung Jerai akan dikekaikan untuk tujuan pertanian komersil seperti penanaman sayur-sayuran dan buah-buahan di kawasan dusun ...* (page 65, encl 27).

4.2.6 Dalam merancang dan menentukan haluan pembangunan Daerah Yan, pertimbangan terhadap pembangunan sektor perhutanan adalah penting untuk menjamin pemeliharaan ekologi tanah, flora, fauna, aspek kestabilan alam sekitar, kawasan tadahan air, hidupan liar, kehidupan alam semulajadi dan penghijauan bumi. Oleh itu:

PF10.

KAWASAN HUTAN SIMPAN SEDIA ADA AKAN DIKEKALKAN DAN DIURUSKAN DENGAN SEMPURNA MENGIKUT FUNGSI MASING-MASING

Jabatan Perhutanan perlu mewartakan dengan seberapa segera kompartmen daripada Hutan Gunung Jerai sebagai hutan tadahan air. Sebarang aktiviti pengusahasilan dan pembangunan yang boleh merosakkan kestabilan alam semulajadi serta menjejaskan bekalan air bersih tidak dibenarkan. Ini adalah perlu untuk kegunaan pertanian, sumber air, dan seterusnya mengelakkan daripada berlakunya banjir (pages 66 & 67, para iv, encl 27).

[65] It is further stated in the structure plan to 'mengekalkan sungai-sungai yang mengalir dari kawasan Hutan Simpan Gunung Jerai untuk aktiviti rekreasi dan pelancongan. Ini termasuk Sungai Udang, Sungai Bakong, Sungai Yan, Sungai Belida, Sungai Ruat dan Sungai Singkir'.

[66] Here, the plaintiffs:

(a) are all inhabitants of the area covered in the structure plan ie Majlis Daerah Yan;

(b) however, more than other members of that community, the 3rd–7th plaintiffs live at the very foot of the forest reserve (within the area of 1–3km — para 9.4 and pp 29 and 32 of encl 49). Please refer to the map annexed as P23 in encl 64. They are within the class of persons who would directly benefit from the protection of the forest reserve and the rivers running in the area and directly impacted by the operation and the quarry;

(c) several of them (para 2 and 3 encl 5; para 4, encl 6; para 5, encl 7 and para 4 affidavit of P4 affirmed on 31 October 2006) own or work on

fruit orchards which are the sources of their income within the vicinity and the structure plan states a specific commitment to these plaintiffs in terms of exploiting the orchards as commercial ventures. P5 has a padi field within the vicinity (para 4, encl 8).

(d) the 3rd–6th plaintiffs rely on their daily or agricultural needs on the water from the river Singkir and/or Badong, and/or their tributaries (encl 6, para 5 and 6; encl 7, para 7; encl 8, paras 5–7; encl 9, para 8).

(e) they would be entitled under s 9(1)(b) of the TCPA to put in representations should a decision be made to amend the structure plan (see s 11 of the TCPA).

[67] Clearly then they come within the class of persons the structure plan seeks to protect those who have homes, orchards or padi field within the area, those whose source of water are the rivers running in the area for which the forest represents an important water catchment area.

[68] As set out in the case of town planning legislation cited above, the Federal Court in *Tok Jwee Kee* ruled that the inhabitants in the zone are meant to be protected. Similarly, in *Chong Sui Jin v Jeramas*, the Court of Appeal held that:

> Furthermore we are the view that the plaintiffs in the instant case are in a stronger position than the plaintiffs in *Lim Cho Hock*'s case and *Lim Kit Siang*'s case because the plaintiffs as the registered owners or the properties in Bandar Sabindo within the Tawau Municipal and *who are the inhabitants, and users of the public space, public playing grounds, parks, car parks and road reserve at Bandar Sabindo are within a much narrower class of people*. Furthermore they are also claiming that s 38 of the Local Government Ordinance gives them the requisite locus standi to sue. In our view the plaintiffs are the persons who are adversely affected by the decision of the *majlis* to develop the said land. They have bought the respective shophouse which have been constructed in accordance with the *first development plan which clearly identified that the said land had been expressly reserved for public space and car parks*. It was on that basis that they bought those shophouse. Under the circumstances we are of the view that the court should adopt a fairly lenient view of the plaintiffs' standing to sue in these proceedings.

[69] There may be cases where the structure plan has come into effect by virtue of having received state authority assent but may not have been gazetted. In the present case, the whole of the structure plan has been gazetted. Its terms have the force of law. And its terms as set out above cannot be any clearer in their intention. These terms can only be altered following the procedures under s 11 of the TCPA. It cannot be disregarded willy nilly. If at all such a project as the fifth defendant's were to be made possible, the structure plan would first have to be altered to make provision for it.

[70] As stated in the case of *Ipoh Town Council & Anor v Ng Khoon Khoon (No 2)* [1960] MLJ 227 at p 230H left:

> The expression ('open development') is used by the town council as part of a plan which has statutory authority and which in the ultimate analysis cannot be differentiated from any other form of legislation such as bye-laws enacted by a subordinate lawmaking body. It is, moreover, legislation affecting the user of land and affecting it by placing restrictions on the title which run with the land and not merely placing personal obligations on the owner for the time being.

[71] Over and above that, the fourth plaintiff has interest in the lands which he occupies within the District of Yan:

(a) The fourth defendant is registered owner of Lot 735, Mukim Singkir, in the District of Yan which is a dusun (P4's affidavit affirmed on the 31 October 2006).

(b) The fourth plaintiff is the heir of his deceased parent who was the registered proprietor of the property ie Lot 878, Mukim Singkir, Daerah Yan (encl 7, para 3).

(c) It has been held that a beneficial or equitable interest suffice (*Kingdom of Spain v Christie Manson & Woods Ltd & Anor* [1986] 3 All ER 28) per Sir Nicolas Browne-Wilkinson VC at p 34, referring to *Gouriet v Union of Post Office Workers & Ors* [1977] 3 All ER 70 at p 100:

> The only kind of rights with which courts of justice are concerned are legal rights; and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party to protect and enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. So for the court to declare jurisdiction to declare any legal right it must be one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event. Obviously in that statement 'legal rights' include equitable rights.

(d) It is important to note the rights of the fourth plaintiff under Mahomedan intestacy law. The estate of a deceased Mahomedan, if he dies intestate, devolves on his heirs at the moment of his deathn... The theory of representation is not known to the Mahomedan law. Under its provisions the estate of a deceased person devolves upon his heirs at the moment of his death. The estate vests immediately in each heir in proportion to the share ordained by Mahomedan law... There is no intermediate vesting in any one, such as an executor or administrator, as under the Indian Succession Act': *Mulla Principles of Mahomedan Law*.

(e) The third plaintiff has exclusive possession of the house in which he lives (para 3 encl 6).

(f) In any event, occupiers of property have always been held to have sufficient interest under the tort of nuisance, what more to obtain a declaration where a lesser interest should suffice: *Woon Tan Kan v Asian Rare Earth* [1992]3 CLJ (Rep) 786 at p 812.

[72] The plaintiffs have also shown some evidence of water from the river Badong and Singkir as being polluted with suspended solids (see para 10, affidavit of Hatijah Bivi Hashim affirmed on 1 November 2006), and that their lives have been impacted by the air pollution from the blasting operations at the quarry. The right to a reasonably healthy and pollution free environment and the right to livelihood (specifically in relation to the second, third, fourth and fifth plaintiffs) are fundamental constitutional rights (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 at pp 288–289.

[73] In deciding whether state action has an impact on fundamental liberties the test is whether such action 'directly affects' or that 'it is an inevitable effect or consequence' on the fundamental right such as to make its exercise ineffective or illusory (p 283 of the case). Although citizens may be deprived of such rights this may only be so *in accordance with procedure prescribed by law (art 5 of the Federal Constitution)*. Where a procedure is unfair it is liable to be struck down.

[74] Furthermore, the illegality in the present case is clear: Section 22(4) of the Town and Country Planning Act, clearly means that no development should be carried out if it contravenes the structure plan. In the present case, over and above s 22(4), the structure plan itself was gazetted and thus has the force of law. The excerpts from the structure plan stated above clearly show that Gunung Jerai Forest Reserve and Sungai Singkir is to be maintained. How can the defendants justify the approval, existence and operation of a quarry on the very site the structure plan states is to be protected?

[75] Having shown a prima facie case of illegality, the burden in fact shifts to the defendants, at least the first to forrth defendants to show that their actions were legal (*Kumari Shrilekha Vidyarthi v State of UP* (1991) 1 SCC 212) at p 242 para 33: 'No doubt it is true ... that there is a presumption of validity of the state action and the burden is on the person who alleges a violation of art 14 to prove the assertion. However, where a plausible reason or principle is indicated nor is it discernible and the impugned state action, therefore, appears to be ex facie arbitrary, the initial burden to prove the arbitrariness is discharged shifting the onus on the state to justify its action

as fair and reasonable. If the state is unable to produce material to justify its action as fair and reasonable, the burden on the person alleging arbitrariness must be held to be discharged.

[76] Section 19 of the TCPA also clearly states that no development can proceed without a planning permission and it has been confirmed, not only that the fifth and sixth defendants failed to apply for one but are now carrying operations in contravention of the second defendant's stop work order.

[77] Based on the aforesaid reasons, the defendants must be estopped by the principles of res judicata from once again raising the issue of locus standi in this matter.

[78] Further or in the alternative, the plaintiffs have more than amply demonstrated the intimate nexus between them and the decisions being challenged, and have satisfied the test of threshold locus standi.

Plaintiff's application allowed.

Reported by Ashgar Ali Ali Mohamed